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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 849

LINCOLN ROCHESTER TRUST COMPANY, as Administrator, c. t. a., of the last Will and Testament of ALBERT E. COPELAND, deceased, PETITIONER

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 24-28) is reported at 188 F. Supp. 839. The opinion of the court of appeals (Pet. App. 19-23) is reported at 297 F. 2d 891.

JURISDICTION

The judgment of the court of appeals was entered on January 10, 1962 (Pet. App. 19). The petition

for a writ of certiorari was filed on April 9, 1962. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals was correct in holding that a life estate coupled with a power to use any part of the principal bequeathed to a surviving spouse is not a life estate with a power of appointment in the surviving spouse within the meaning of Section 812 (e)(1)(F) of the Internal Revenue Code of 1939, as amended, and therefore does not qualify for the estate tax marital deduction.

STATUTE AND REGULATIONS INVOLVED

Relevant portions of Section 812(e) of the Internal Revenue Code of 1939, as amended, and Treasury Regulations 105, Section 81.47a, are set forth in the Appendix, *infra*, pp. 12-18.

STATEMENT

All of the facts were stipulated (R. 17a-20a). Those facts relevant to this proceeding may be summarized as follows:

The decedent, Albert E. Copeland, was a resident of New York at his death on September 26, 1950 (R. 18a). His will provided in part (R. 13a):

> SECOND: I give, devise and bequeath to my wife, Jenny Morris Copeland, in case she survives me, the life use of all the rest, residue and remainder of my estate, both real and personal,

> wherever the same may be situated, with the right to use any part of the principal thereof.
>
> THIRD: I give, devise and bequeath Thirty-five Per Cent (35%) of the residue of my estate, after the death of my said wife, or in case my said wife shall predecease me, to each of my sons Morris A. Copeland and Arthur H. Copeland.

The remaining 30 per cent was held in trust for the grantor's grandchildren (R. 14a).

On November 1, 1951, the administrator filed an estate tax return and paid the tax computed therein. On the return, a marital deduction of $148,589.00 was claimed with respect to the residuary estate. The Commissioner disallowed the amount deducted and assessed an additional estate tax of $14,055, together with interest of $452, which were paid on July 10, 1952. (R. 18a-19a; Pet. App. 24.)

The administrator instituted a proceeding in the Monroe County, New York, Surrogate's Court to secure a construction of the second paragraph of the decedent's will (R. 19a). On May 13, 1952, the Surrogate entered his decree of judicial settlement which provided in part (R. 21a):

> that the purpose and effect of the said paragraph ["Second"] of the decedent's Last Will and Testament was to give to Jenny Morris Copeland the life use of all of the residuary estate with an unlimited right to consume any or all of the principal thereof * * *.

The administrator filed a claim for refund on June 27, 1955, for the $14,507 paid on July 10, 1952; the

claim was disallowed by the District Director, and suit for refund was timely brought by the administrator in the district court. (R. 19a.)

The district court held for the taxpayer (R. 20a-25a; Pet. 24-28). On appeal, the Second Circuit reversed.

ARGUMENT

In its decision, the Second Circuit held that the present case is controlled by its own recent decision in *May's Estate* v. *Commissioner*, 283 F. 2d 853—a case virtually identical with the case at bar. Certiorari was denied last term in *May's Estate*, 366 U.S. 903; there is similarly no occasion for further review of the present case. Contrary to taxpayer's assertions, the decision below is correct and does not conflict with that of any other court of appeals.

1. For purposes of computing the federal estate tax, Section 812(e) of the Internal Revenue Code of 1939, as amended (App., *infra*, pp. 12-14), allows a deduction from the gross estate, which is not to exceed 50% of the value of the adjusted gross estate, for certain gifts passing from a decedent to his surviving spouse. This marital deduction, however, is not available for gifts of life estates and "Other Terminable Interest[s]," defined in Section 812(e)(1)(B) (App., *infra*, pp. 12-13), because, although these interests pass to the surviving spouse, they nevertheless terminate and pass to others upon the lapse of time or the occurrence of a contingency.

(*a*) The interest of the surviving spouse in the present case (a legal life estate, coupled with a power

to use the principal with remainder over) is undisputably "terminable" within the meaning of the statute. Unless the interest qualifies under Section 812(e)(1)(F) of the 1939 Code, as amended, (App., *infra*, pp. 13-14), which provides an exception to the terminable interest rule, it cannot qualify at all for the marital deduction.

Section 812(e)(1)(F) allows a deduction for interests passing from a decedent to his surviving spouse—

> if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, * * * with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either * * *) * * *.

The subparagraph is applicable however—

> only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

The question before the lower courts was whether under Section 812(e)(1)(F) the surviving spouse had the power to appoint the corpus to herself.[1] Section 81.47a(c)(7) of Treasury Regulations 105

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[1] Under the decedent's will and under New York law, Mrs. Copeland, the surviving spouse, clearly did not have the power to devise or bequeath the principal of the life estate. See *Matter of Ithaca Trust Co.*, 220 N.Y. 437.

(App., *infra*, pp. 16-18) describes this power of appointment as a power in the surviving spouse to appoint the corpus to herself as unqualified owner, "that is, in effect, to dispose of it to whomsoever she pleases". (Sec. 81.47a(c)(7)(ii)). Moreover, Section 81.47a(c)(7)(i)(*a*) specifies an unlimited power to invade as an example of a power to appoint. These long-standing provisions, which were originally adopted in 1949,[5] have been favorably cited and applied by the courts. *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3d); *Estate of Tarver* v. *Commissioner*, 26 T.C. 490, affirmed on this issue, 255 F. 2d 913 (C.A. 4th); *Estate of Semmes* v. *Commissioner*, 288 F. 2d 664 (C.A. 6th) (applying the same provision in the 1954 Code Regulations). See also *Hoffman* v. *McGinnes*, 277 F. 2d 598 (C.A. 3d).[6]

(*b*) The legislative history of the 1958 amendment to Section 812(e)(1)(F) demonstrates Congressional approval of Section 81.47a(c)(7) of the regulations. In the Eighty-fifth Congress, First Session, the House passed a bill, H.R. 8881 (103 Cong. Rec. 15063-15064), which would have amended Section 812(e)(1)(F) to conform it to the more liberal provisions of the corresponding section of the 1954 Code, Sec-

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[5] T.D. 5699, 1949-1 Cum. Bulk. 181.

[6] Taxpayer cites (Pet. 17-18) *Gelb* v. *Commissioner*, 298 F. 2d 544 (C.A. 2d), as disapproving other marital deduction regulations. That case, however, dealt with a surviving spouse's specific interest in a life estate under Regulations Section 81.47a(c)(3) and did not deal with the surviving spouse's power of appointment under Section 81.47a(c)(7).

tion 2056(b)(5).[1] The committee report accompanying this bill (H. Rep. No. 1027) interpreted certain language in the bill as permitting merely an unlimited power of consumption to qualify as a power of appointment under Section 812(e)(1)(F). The bill died in the Senate Finance Committee (see 103 Cong. Rec. 15100). The Finance Committee, however, added to the Technical Amendments Bill of 1958 a provision (now Sec. 93(a), Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606) which also conformed Section 812(e)(1)(F) of the 1939 Code to Section 2056(b)(5) of the 1954 Code, but without the additional language of H.R. 8881 interpreted by H. Rep. No. 1027. The committee reports relating to Section 93(a) of the Technical Amendments Act did not mention any change in the nature of the power of appointment from that previously ascribed to that power under Section 812(e)(1)(F) or under Section 2056(b)(5). See S. Rep.

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[1] Section 812(e)(1)(F) at that time applied only to interests in trust and only if the surviving spouse had a life income and a power of appointment with respect to the entire interest. Section 2056(b)(5) applies to a specific interest in property in addition to an entire interest and also to such interests whether or not in trust. These differences were the only substantive differences between Section 812(e)(1)(F), as it then read, and Section 2056(b)(5) as enacted by the 1954 Code. Section 2056(b)(5) made no change in the nature of the required power of appointment. See H. Rep. No. 1337, 83d Cong., 2d Sess., pp. 91, A318 (3 U.S.C. Cong. & Adm. News (1954) 4017, 4118, 4161); S. Rep. No. 1622, 83d Cong. 2d Sess., pp. 125, 475 (3 U.S.C. Cong. & Adm. News (1954) 4621, 4758, 5118); *Hoffman* v. *McGinnes*, 277 F. 2d 598 (C.A. 3d).

No. 1983, 85th Cong., 2d Sess., p. 106 (1958-3 Cum. Bull. 922, 1028); H. Conf. Rep. No. 2632, 85th Cong., 2d Sess., p. 38 (1958-3 Cum. Bull. 1188, 1225). The failure of Congress to make any change in the interpretation in the Regulations of the power of appointment under Section 812(e)(1)(F), after a change had been proposed, indicates legislative approval and acceptance of the original interpretation.

(*c*) Under the laws of New York, which govern the scope of the decedent's will in the present case, a life tenant with broad power to use and consume the principal of a life estate cannot appoint or appropriate the principal to himself as his own property; rather, the life tenant must use and consume the principal fairly, honestly, and in good faith, for his own use and benefit, and not to squander, waste, or otherwise divert the principal from the decedent's remaindermen. *Matter of Briggs*, 101 Misc. 191, 167 N.Y.S. 632, modified, 180 App. Div. 752, 168 N.Y.S. 597, affirmed, 223 N.Y. 677, 119 N.E. 1032; *Matter of Britt*, 272 App. Div. 426, 71 N.Y.S. 2d 405; *Matter of Mitchell*, 15 Misc. 2d 651, 181 N.Y.S. 2d 436. For example, the life tenant may not make a gift out of the corpus of the estate. *Vincent* v. *Putnam*, 127 Misc. 647, affirmed, 221 App. Div. 211, affirmed, 248 N.Y. 76, 81-82; *In re May's Estate*, 112 N.Y.S. 2d 847.

Since New York law governs the scope of the decedent's will, the surviving spouse clearly has no right to appoint the principal to herself; her use and disposition of the principal is limited and is not

exercisable in all events. The court of appeals correctly held, therefore, that the widow's interest in her husband's residuary estate did not qualify under the Section 812(e)(1)(F) exception to the terminable interest rule, and that the Commissioner correctly disallowed the marital deduction for that interest.

2. There is no conflict between the decision below and that of any other court of appeals. Taxpayer's contention (Pet. 6-8) that the decision below conflicts with *Hoffman* v. *McGinnes*, 277 F. 2d 598 (C.A. 3d), fails to recognize, as the court itself recognized in *Hoffman*, that each case turns on the construction of the particular will under the applicable local law (see *Morgan* v. *Commissioner*, 309 U.S. 78). In *Hoffman*, the court held that, under the particular terms of the will there involved, the surviving spouse had a power to appoint the life estate to herself. The court distinguished that case on its facts from its earlier decision in *Commissioner* v. *Ellis' Estate*, 252 F. 2d 109 (C.A. 3d), in which a surviving spouse's power of invasion was held not to be exercisable in all events because under Pennsylvania law the spouse could invade the life estate only in good faith. The rationale of *Ellis' Estate* is in accord with the decisions of the court below.

Taxpayer suggests (Pet. 8-12, 15) that certiorari should be granted because in *Pipe's Estate* v. *Commissioner*, 241 F. 2d 210, certiorari denied, 355 U.S.

In its petition herein, taxpayer does not raise any question as to the holding of the New York case.

814, and in *May's Estate* v. *Commissioner*, *supra*, the court below held that, for the surviving spouse's power to invade to be effective under the statute, it must include the power to dispose of the unconsumed corpus by will. As the Second Circuit itself stated in *May's Estate*, the language in *Pipe's Estate* referring to the spouse's power to devise the unconsumed corpus was dictum; *May's Estate* clearly does not rest on the surviving spouse's lack of power to devise unconsumed corpus. Furthermore, even if those cases stand for the proposition for which taxpayer cites them,[6] the present case, which admittedly does not rest on that ground, would hardly be an appropriate vehicle to review those holdings.[7]

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[6] Taxpayer also cites (Pet. 11) *Piatt* v. *Gray*, 201 F. Supp. 401 (W.D. Ky.), as another case holding that the surviving spouse's power to appoint to herself to be effective under the statute must also include the power to devise the unconsumed principal of the life estate. *Piatt* is presently pending on appeal in the Sixth Circuit.

[7] Taxpayer's contention (Pet. 13-15) that there is a correlation between Section 811(f)(3) defining a power of appointment includible in the gross estate and the power of appointment qualifying under Section 812(e)(1)(F) as an exception to the terminable interest rule has been rejected by every appellate court that has considered it. *Starrett* v. *Commissioner*, 223 F. 2d 163 (C.A. 1st); *Pipe's Estate* v. *Commissioner*, *supra*; *Commissioner* v. *Ellis' Estate*, *supra*; *McGehee* v. *Commissioner*, 260 F. 2d 818 (C.A. 5th); *May's Estate* v. *Commissioner*, *supra*.

Taxpayer's related argument (Pet. 16-17) that the good faith limitation on the life tenant's power of consumption is not an event limiting the exercise of the power is not supported by any authority; in point of fact Section 81.17a (c)(7)(iii) of Treasury Regulations 105 and *Commissioner* v. *Ellis' Estate*, *supra*, are both to the contrary.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MAY 1962.

APPENDIX

Internal Revenue Code of 1939 (26 U.S.C. 1952 ed.):

SEC. 812. NET ESTATE.

For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States by deducting from the value of the gross estate—

* * * *

(e) [As added by Sec. 361(a) of the Revenue Act of 1948, c. 168, 62 Stat. 110] *Bequests, Etc., to Surviving Spouse.*—

(1) *Allowance of marital deduction.*—

(A) *In General.*—An amount equal to the value of any interest in property which passes or has passed from the decedent to his surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

(B) *Life Estate or Other Terminable Interest.*—Where, upon the lapse of time, upon the occurrence of an event or contingency, or upon the failure of an event or contingency to occur, such interest passing to the surviving spouse will terminate or fail, no deduction shall be allowed with respect to such interest—

(i) if an interest in such property passes or has passed (for less than an adequate and full consideration in money or money's worth) from the decedent to any person other than such surviving spouse (or the estate of such spouse); and

(ii) if by reason of such passing such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest so passing to the surviving spouse;

and no deduction shall be allowed with respect to such interest (even if such deduction is not disallowed under clauses (i) and (ii)—

(iii) if such interest is to be acquired for the surviving spouse, pursuant to directions of the decedent, by his executor or by the trustee of a trust.

For the purposes of this subparagraph, an interest shall not be considered as an interest which will terminate or fail merely because it is the ownership of a bond, note, or similar contractual obligation, the discharge of which would not have the effect of an annuity for life or for a term.

* * * *

(F) [As amended by Sec. 93(a) of the Technical Amendments Act of 1958, P.L. 85-866, 72 Stat. 1606, 1668] *Life Estate With Power of Appointment in Surviving Spouse.* —In the case of an interest in property passing from the decedent, if his surviving spouse is entitled for life to all the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the surviving spouse to appoint the entire interest, or such specific portion (exercisable

in favor of such surviving spouse, or of the estate of such surviving spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of the interest, or such specific portion, to any person other than the surviving spouse—

(i) the interest or such portion thereof so passing shall, for purposes of subparagraph (A), be considered as passing to the surviving spouse, and

(ii) no part of the interest so passing shall, for purposes of subparagraph (B) (i), be considered as passing to any person other than the surviving spouse.

This subparagraph shall apply only if such power in the surviving spouse to appoint the entire interest, or such specific portion thereof, whether exercisable by will or during life, is exercisable by such spouse alone and in all events.

* * * *

Treasury Regulations 105 (1939 Code):

SEC. 81.47a [As added by T.D. 5699, 1949-1 Cum. Bull. 181, 195, and amended by T.D. 6529, 1961-1 Cum. Bull. 753, 768] *Bequests, Etc., to Surviving Spouse.*—

* * * *

(c) *Marital deduction; life estate with power of appointment in surviving spouse.*—(1) *In General.*—Except as otherwise provided in subparagraph (10) of this paragraph (pertaining to

estates of decedents dying after December 31, 1947, and on or before April 1, 1948), if an interest in property passes from the decedent to his surviving spouse (whether or not in trust) and the spouse is entitled for life to all the income from the entire interest or all the income from a specific portion of the entire interest, with a power in her to appoint the entire interest or the specific portion, the interest which passes to her is under the provisions of section 812 (e)(1)(F), as amended by section 93(a) of the Technical Amendments Act of 1958, a deductible interest, to the extent that it satisfies all five of the conditions set forth below, (see subparagraph (2) of this paragraph if one or more of the conditions is satisfied as to only a portion of the interest):

(i) The surviving spouse must be entitled for life to all of the income from the entire interest or a specific portion of the entire interest, or to a specific portion of all the income from the entire interest.

(ii) The income payable to the surviving spouse must be payable annually or at more frequent intervals.

(iii) The surviving spouse must have the power to appoint the entire interest or the specific portion to either herself or her estate.

(iv) The power in the surviving spouse must be exercisable by her alone and (whether exercisable by will or during life) must be exercisable in all events.

(v) The entire interest or the specific portion must not be subject to a power in any

other person to appoint any part to any person other than the surviving spouse.

* * * * *

(5) *Application of local law.*—In determining whether or not the conditions set forth in subparagraph (1)(i) through (v) of this section are satisfied by the instrument of transfer, regard is to be had to the applicable provisions of the law of the jurisdiction under which the interest passes * * *.

* * * * *

(7) *Power of appointment in surviving spouse.*—(i) The conditions set forth in subparagraph (1) (iii) and (iv) of this paragraph, that is, that the surviving spouse must have a power of appointment exercisable in favor of herself or her estate and exercisable alone and in all events, are not met unless the power of the surviving spouse to appoint the entire interest or a specific portion of it falls within one of the following categories:

(*a*) A power so to appoint fully exercisable in her own favor at any time following the decedent's death (as, for example, an unlimited power to invade); or

(*b*) A power so to appoint exercisable in favor of her estate. Such a power, if exercisable during life, must be fully exercisable at any time during life, or, if exercisable by will, must be fully exercisable irrespective of the time of her death (subject in either case to the provisions of section 81.47b(d), relating to interests conditioned on survival for a limited period); or

(c) A combination of the powers described under subdivisions (a) and (b) of this subdivision. For example, the surviving spouse may, until she attains the age of 50 years, have a power to appoint to herself and thereafter have a power to appoint to her estate. However, the condition that the spouse's power must be exercisable in all events is not satisfied unless irrespective of when the surviving spouse may die the entire interest or a specific portion of it will at the time of her death be subject to one power or the other (subject to the exception in section 81.47b(d), relating to interests contingent on survival for a limited period).

(ii) The power of the surviving spouse must be a power to appoint the entire interest or a specific portion of it as unqualified owner (and free of the trust if a trust is involved, or free of the joint tenancy if a joint tenancy is involved) or to appoint the entire interest or a specific portion of it as a part of her estate (and free of the trust if a trust is involved), that is, in effect, to dispose of it to whomsoever she pleases. * * *

(iii) A power is not considered to be a power exercisable by a surviving spouse alone and in all events as required by subparagraph (1)(iv) of this paragraph if the exercise of the power in the surviving spouse to appoint the entire interest or a specific portion of it to herself or to her estate requires the joinder or consent of any other person. The power is not "exercisable in all events", if it can be terminated during the life of the surviving spouse by any event other than her complete exercise or release of it. Further, a power is not "exercisable in all events" if it may be

exercised for a limited purpose only. For example, a power which is not exercisable in the event of the spouse's remarriage is not exercisable in all events. Likewise, if there are any restrictions, either by the terms of the instrument or under applicable local law, on the exercise of a power to consume property (whether or not held in trust) for the benefit of the spouse, the power is not exercisable in all events. Thus, if a power of invasion is exercisable only for the spouse's support, or only for her limited use, the power is not exercisable in all events. In order for a power of invasion to be exercisable in all events, the surviving spouse must have the unrestricted power exercisable at any time during her life to use all or any part of the property subject to the power, and to dispose of it in any manner, including the power to dispose of it by gift (whether or not she has power to dispose of it by will).

* * * *